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No. 92-695

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Cross-Petitioners,

v.

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Cross-Respondents.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Cross-Petitioners,

v.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Cross-Respondents.

Cross-Petition For A Writ of Certiorari To The Supreme Court Of The State Of Washington

BRIEF OF PETITIONERS IN OPPOSITION

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The statement of the case in the cross-petition is incomplete and inaccurate in several respects. For example, it fails to state that the *Robinson* class alleged a facial regulatory taking only and that the "taking" claim in *Sintra* was remanded to the trial court for trial on the merits; it states erroneously that Sintra "was denied the permit" (Sintra was granted permit approval after a delay) and that the Washington Supreme Court ruled in both cases that property owners were not entitled to money damages under 42 U.S.C. § 1983 for a substantive due process violation. (Cross-Pet. 4-5). We refer the Court to the statement of the case in our petition filed in No. 92-487.

Cross-petitioners agree that the first question presented in our petition for a writ of certiorari warrants this Court's review.[2] They seek to append two questions relating to their taking claims and one question relating to 42 U.S.C. § 1983. The first two questions posed in the cross-

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the City of Seattle is a municipality and, as such, has no parents or subsidiaries. All of the other petitioners are individuals.

[2] That question is whether a land use ordinance that is found to be a reasonable means of achieving a legitimate public purpose, and which is not found to effect a "taking," may nevertheless be held to deprive landowners of property in violation of Fourteenth Amendment "substantive due process" on the ground that it is "unduly oppressive." The petition presents two other questions on which cross-petitioners oppose certiorari. We have filed a reply brief responding to the cross-petitioners' brief in opposition.

petition do not merit review; we do not oppose review of the third question in connection with this Court's review of the first question presented in our petition.

1. Neither *Robinson* nor *Sintra* presents a "taking" question that warrants this Court's review.

a. In *Robinson*, the Washington Supreme Court determined (Pet. App. 13a) that cross-petitioners' taking claim was "a facial challenge" and that they were not asserting an "as applied" taking claim. But the court found that, on the one hand, the Housing Preservation Ordinances ("HPO") "did advance legitimate state interests in the general welfare of the citizens of Seattle," Pet. App. 13a, and on the other hand, cross-petitioners "[did] not provide adequate basis" for any allegation that "the [HPO] denied all economically viable use of *any* regulated property" (*id.* 14a, emphasis in original). The refusal to find a facial regulatory taking in the absence of the two circumstances listed in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), was correct and unremarkable. *See Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886, 2893-94 (1992).

b. In *Sintra*, the Washington Supreme Court ruled correctly that the cross-petitioners must pursue their taking remedy under state law before any federal claim would be ripe. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). The court reversed a grant of summary judgment for petitioner and remanded for examination of whether an exhaustion requirement had been satisfied "and if so, to determine [under state law] if a taking has in fact occurred, the time period of any taking, and appropriate

damages." Pet. App. 84a. Any federal law taking issue in that case is plainly not ripe for this Court's review.

2. Cross-petitioners invoke *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), but that case is not in point. *Nollan* involved the first prong of the two-prong *Agins* test: whether the law "substantially advances a legitimate state interest." 447 U.S. at 260. The Court held that the requirement that, in exchange for a building permit, beachfront property owners must cede the right to travel *along* their beach, did not serve the only legitimate state interest that had been asserted: the interest in preserving visual access to the ocean.

These cases do not present any *Nollan* question. As the Washington Supreme Court said in *Robinson*, "the housing replacement and tenant assistance provisions were substantially related to preserving low income housing and assisting tenants experiencing relocation hardships. We conclude that the ordinance did advance legitimate state interests in the general welfare of the citizens of Seattle in [these respects]." Pet. App. 13a. The conditions imposed under the Seattle ordinance were triggered by cross-petitioners' decisions to take actions that would reduce the housing stock and displace existing tenants. The nexus between these consequences of development and the requirements of replacement housing and tenant relocation assistance is obvious and direct.

3. Cross-petitioners also invoke *Armstrong v. United States*, 364 U.S. 40, 49 (1960), asserting that they alone are being asked to share burdens that ought, in fairness and justice, to be borne by the public as a whole. To begin with, their assertion that their class alone is required to

bear the burden of society's need for rental housing is not supported by the record and is a considerable exaggeration: low-income rental housing programs in Seattle are supported by federal, state, county, and city tax revenues, including general property tax levies approved by the citizens of Seattle to support such housing. Seattle Ordinances Nos. 110124 (1979) & 112904 (1986). Seattle allows private developers to transfer development rights from downtown low-income housing and offers zoning bonuses for construction or preservation of such housing. Seattle Mun. Code Ch. 23.49. The portion of the social burden imposed on cross-petitioners was the portion related directly to their own decisions to convert housing to non-residential uses.

More important, this Court has rejected the notion that the *Armstrong* dictum explaining the purpose of the Taking Clause can be the basis for a facial taking challenge where neither of the two *Agins* factors is present. In *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988), the Court refused to consider a facial challenge, based on the *Armstrong* dictum, to a rent control ordinance authorizing the possible reduction of the allowable rent because of the low income of a tenant. Emphasizing that taking claims generally present an "essentially ad hoc, factual inquiry," 485 U.S. at 10, the Court said that consideration of the taking claim was premature. Here, the taking claim in *Robinson* is made on the face of the ordinance, without evidence of the effect of the ordinance on the ability of

any landowner to obtain a reasonable return on its property, and the taking claim in *Sintra* will be taken up on remand.[3]

4. Finally, cross-petitioners contend that, after the Washington Supreme Court held the HPO to be "unduly oppressive" in violation of "substantive due process," it should have ruled that they were automatically entitled to damages under 42 U.S.C. § 1983 on that claim. The Washington Supreme Court *did* remand for proceedings on § 1983 damages: in *Robinson*, the court said, "we conclude that the Robinsons state a proper claim for violation of substantive due process under section 1983" (Pet. App. 21a), and it "remand[ed] the case to the trial court for determination of the liability of . . . the City of Seattle under the plaintiffs' section 1983 substantive due process claims. . . . " (Pet. App. 50a). The disposition of *Sintra* on this point was similar. Pet. App. 85a-88a. But we agree with cross-petitioners that the Washington Supreme Court appears to have ruled that they stated a claim for damages only because the ordinance was "unduly oppressive" *and* was enforced after a trial court in another case had held it invalid on state law grounds. We do not oppose the Court's consideration (in connection

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[3] The cross-petition asserts (at 10) that in *Orion Corp. v. State of Washington*, 109 Wash. 2d 621, 747 P.2d 1062 (1987), the Washington Supreme Court immunized certain regulations from taking claims even if they deny the landowner all economically viable use of his property. Any such holding in *Orion* is entirely irrelevant to the present cases, because the Washington Supreme Court found that the HPO was not so immunized, and because there was no finding that all economically viable use was denied. (*Robinson*, Pet. App. 12a-14a; *Sintra*, Pet. App. 80a-82a).

with its consideration of the undue oppression/substantive due process issue) of the question whether, if HPO provisions *did* facially violate substantive due process, cross-petitioners would be entitled to whatever damages they could show had been caused by application of those provisions. Indeed, the first question presented in our petition – whether a land use regulation that does not effect a taking can nevertheless violate Fourteenth Amendment rights by being "unduly oppressive" – gains extra importance from the fact that Section 1983 makes a city that violates federal constitutional rights liable in damages.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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